SITI ROHANI MOHD SHAH & ORS

v.

HJ ZAINAL HJ SAIFIEE & ANOR

HIGH COURT MALAYA, MUAR
JEFFREY TAN J
[CIVIL APPEAL NO: 12-40-1998]
17 NOVEMBER 2000

ROAD TRAFFIC: *Licence - Driving motor vehicle without licence - Duty of care towards unlawful road user*

The 1st appellant was the rider of a motorcycle who was 11 years old when the accident occurred and therefore without a valid driving licence. The 1st appellant collided with a lorry driven by the 2nd respondent at a sharp bend of the road. The trial judge took the view that the 2nd respondent gave the true version of the collision and gave judgment for the 2nd respondent. The appellants appealed.

Held:

[1] All proper inferences must be drawn from the incontestable evidence, and the version to be preferred must be consistent with or at least more consistent with the incontestable evidence. A version cannot be preferred if it is inconsistent or more inconsistent with the incontestable evidence.

[2] The trial judge fell into error in failing to draw proper inferences from the incontestable evidence, in making the wrong assumptions, and in failing to consider material probabilities.

[3] An appellate court can act upon its own view of the conflicting evidence in appropriate circumstances.

[4] Riding or driving without a valid license *per se* is not negligent. The law does not sanction a person without a valid licence to be riding or driving a vehicle on the road, but that person is not fair game with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road. The only remedy or penalty is that prescribed in the Road Transport Act 1987. The remedy is not an actionable wrong.

[Appeal allowed.]

Case(s) referred to:
Che Wil v. Mahmood Ismail [1982] CLJ 484 ***(foll)***
Chew Soo Lian v. Ludhiana Transport Syndicate & Anor [1976] 2 MLJ 206 ***(refd)***
Chu Kim Sing & Anor v. Abdul Razak Amin [1999] 4 CLJ 448 ***(refd)***
Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) v. Government of Malaysia [1994] 1 CLJ 321 ***(refd)***
Croston v. Vaughan [1938] 1 KB 540 ***(refd)***
Phillips v. Britannia Hygienic Laundry Co Ltd [1923] 2 KB 832 ***(refd)***
Rubie v. Faulkner [1940] 1 KB 571 ***(refd)***
Searle v. Wallbank [1947] AC 341 ***(refd)***
Verney v. Wilkins [1962] 106 Sol Jo 879 ***(refd)***
Yahya Mohamed v. Chin Tuan Nam [1975] 2 MLJ 117 ***(refd)***
Yusoff Kassim v. PP [1992] 3 CLJ 1535 ***(foll)***

Legislation referred to:
Road Transport Act 1987, ss. 26, 39

For the appellants - Harjit Singh Nijar; M/s Nijar & Nijar
For the respondents - Lai Kuan Jean; M/s Taye & Co

Reported by Yow Ting Fong

JUDGMENT

Jeffrey Tan J:

On 4 May 1998, after full trial of the above running down action, the Muar Sessions Court held that the appellants had not proved negligence on the part of the respondents for the collision between the motorcycle (JBC 1152) ridden by the 1st appellant and the motor-lorry (JD 5731) driven by the 2nd respondent, and dismissed the whole of the appellants' claims. This is the appellants' appeal against that decision.

It is not in dispute, that at the material time of the collision (23 February 1995 at about 2pm), the 1st appellant riding the said motorcycle was travelling along Jalan Tanjong Olak towards Tanjong Olak, whilst the 2nd respondent driving the said lorry was travelling on the same road from the opposite direction and towards Pekan Bukit Pasir, Muar, and, the said collision occurred at a sharp bend of the road. However, it is in serious dispute as to how the collision occurred.

In the court below, the 1st appellant testified that the lorry at speed had encroached onto her road, and that she had no time to avoid the lorry. "Lori itu memasuki separuh jalan saya." She was returning home from school. She denied that she had encroached onto the 2nd respondent's road. She maintained that the collision occurred on her side of the road. Her pillion rider (SP2) as well testified that the collision occurred on the 1st appellant's side of the road.

The opposing version, that the 2nd respondent testified, was that the 1st appellant's motorcycle had encroached onto his road and then collided with his lorry's right side tyre. "Apabila saya sampai di selekoh tajam di Kampong Tanjong Olak, tiba-tiba datang sebuah motosikal dari hadapan saya dan masuk ke hak laluan saya dan terlanggar ke tayar lori saya disebelah kanan" (see p. 23 of the Appeal Record).

The 1st appellant, SP2 and 2nd respondent were the only eye-witnesses, and the 2nd respondent was the only witness called by the defence.

With commendable alacrity, the trial court held, at the close of submissions, that the appellants, "gagal membuktikan kecuaian defendant pertama dan defendan kedua atas imbangan kebarangkalian dan dengan itu tuntutannya ditolak dengan kos", and recorded the following reasons (see p. 24 of the Appeal Record):

> (i) keterangan pegawai penyiasat (SP4) ... mengatakan lori tidak menunjukkan apa-apa kerosakan ... Ini menunjukkan bahawa tidak ada 'physical contact' diantara bahagian tengah lori tersebut dan motosikal ... Tidak ada sebarang objek atau calar ditemui di tempat kejadian khususnya di laluan plaintif pertama. Defendan kedua dalam laporan polisnya ... mengatakan bahawa plaintiff pertama ... memasuki laluannya dan terus terlanggar tayar kanan di sebelah belakang lorinya ... Sebaliknya dalam repot polisnya, plaintiff pertama menyebut bahawa bahagian tengah lori defendan terkena motosikalnya. Keterangan SP4 tidak menyokong dakwaannya.
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> (ii) rajah kasar (P4) tidak menyokong versi plaintiff pertama.
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> (iii) keterangan SP2 diambilkira tetapi Mahkamah memberi valuenya yang tidak sepenuhnya – soal interested witness dan partisan witness.
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> (iv) kerosakan motosikal iaitu rim di hadapannya bengkok adalah konsisten dengan versi defendan kedua.

Later, in its grounds of judgment (see p. 26 to 31 of the Appeal Record), the trial court elaborated on the reasons for its decision. According to the trial court, (i) SP2 was a friend of the 1st appellant and so was an "interested witness" (see p. 28 of the Appeal Record), (ii) judicial notice must be taken that any vehicle travelling at speed towards Tanjong Olak and negotiating the said sharp bend would be "pulled" (tank) towards the other side of the road (see p. 28 (reverse) of the Appeal Record), (iii) the lorry was an old vehicle carrying timber and so it could not have been travelling fast, or else the timber would have fallen off the lorry onto the road, and, (iv) a vehicle travelling towards Pekan Bukit Pasir from Tanjong Olak (as was the 2nd respondent) and negotiating a right hand bend would

be "pulled" to the left side of the road facing Pekan Bukit Pasir, and so as such, it was not possible for the lorry to have encroached onto the 1st appellant's side of the road. Then on the plaintiffs' version of the accident, the trial court concluded, "keterangan plaintiff pertama bahawa defendan kedua datang dengan laju dan terlanggarnya tidak berasas berdasarkan alasan yang tersebut di atas", and, that it could not be true that the motorcycle collided with the middle section of the lorry (the 1st appellant stated so in her police report – see p. 43 of the Appeal Record) as there was not a scratch on the lorry.

According to the trial court, the 2nd defendant gave the true version of the collision, and that the reasons were: (i) the 2nd respondent remained at the scene for about four hours after the collision, whereas, under the circumstances, any driver, whether at fault or not but more so if at fault, would have run away from the scene, (ii) it was more probable that the 1st appellant was riding fast and lost control of her motorcycle, (iii) the road was wet, and the court could not cast aside the fact that the road was slippery, (iv) and as a result, the 1st appellant encroached onto the 2nd respondent's road, (v) the 1st appellant who was 12 years old had only one year's riding experience, (vi) the damage to the motorcycle showed that the motorcycle collided with the tyre of the lorry; if the lorry was travelling at speed and had collided with the motorcycle, the damage to the motorcycle would have been much more extensive and there would even have been fatalities, as both the 1st appellant and SP2 were not wearing safety helmets.

Let it be said, at the onset, that the trial court fully appreciated that there were two conflicting versions of the collision. At p. 30 (reverse) of the Appeal Record, the trial court quoted the following passage from *Yahya bin Mohamed v. Chin Tuan Nam* [1975] 2 MLJ 117, 118, per Syed Agil Barakbah J:

> Where the drivers and witnesses on each side tell conflicting stories the photos, plans and measurements of the scene and the nature of the damage to each vehicle must provide the most reliable guide by which such evidence can be tested.

The injury occasioned to the right leg of the 1st appellant whilst she was riding a motorcycle in the instant case also provided a most reliable guide by which the conflicting versions could be tested.

That is not to say though, that the evidence of the parties themselves and or their witnesses could be ignored. For "the percentage of traffic accident cases which can be satisfactorily decided wholly independently of oral

testimony must be very small (see *Yahya bin Mohamed v. Chin Tuan Nam* [1975] 2 MLJ 117, 123, per Lord Edmund-Davies). But in the final analysis, all proper inferences must be drawn from the incontestable evidence, and the version to be preferred must be consistent or at least more consistent with the incontestable evidence. A version cannot be preferred, no matter what, if it is inconsistent or more inconsistent with the incontestable evidence.

Yes, the trial court did decide the case on the oral testimony and incontestable evidence. Except, with respect, that it fell into error in carrying out that exercise. In short, proper inferences were not drawn from the incontestable evidence.

At the sharp bend, the 1st appellant was negotiating to the left, whilst the 2nd respondent was negotiating to the right. In *Chew Soo Lian v. Ludhiana Transport Syndicate & Anor* [1976] 2 MLJ 206 (and the following passage was quoted by the trial court), the Federal Court, per Gill CJ, said:

> For him it was a right hand bend and it is common knowledge that there is a greater tendency for the driver of a vehicle to cut corners when negotiating such a bend.

For the 1st appellant, it was a left hand bend, and there was no tarmac to the left to "cut corners". But for the 2nd respondent, it was a right hand bend. The only driver with any tendency to "cut corners" could have been the 2nd respondent. Yet having noted the above observation of the Federal Court in *Chew Soo Lian v. Ludhiana Transport Syndicate & Anor*, the trial court startlingly held the opposite:

> Justeru itu, tidak ada mungkinan bahawa lori defendan kedua yang dikatakan telah memasuki laluan plaintiff pertama. Keterangan plaintiff pertama bahawa lori defendan kedua datang dengan laju dan terlanggarnya juga tidak berasas berdasarkan yang tersebut di atas.

How it could have been concluded that the lorry could not have encroached onto the 1st appellant's road is most baffling. Negotiating a right hand bend, the lorry could "cut corners", and to say therefore that there was no possibility that the lorry could have encroached onto the motorcycle's path is not logical. The inference that the lorry could not have encroached onto the motorcycle's path is just not proper.

The investigation officer (SP4) testified that he found no damage to the lorry. But the lorry was a tall and heavy vehicle, with a solid front bumper and a solid wooden superstructure (see p. 59 of the Appeal Record). It was more than probable that the collision between the giant solid lorry and the puny and also fragile motorcycle could have left the lorry without a scratch.

Yet, it was somehow concluded, just because SP4 testified that there were no damage to the lorry, "ini menunjukkan bahawa tidak ada 'physical contact' diantara bahagian tengah lori tersebut dan motosikal" (see p. 24 of the Appeal Record), and, "sekiranya betul, bahagian tengah lori sepertimana yang bolih dilihat di gambar di P2 di ms 8 akan menunjukkan sekurang-kurangnya sedikit kesan calar atau kerosakan" (see p. 29 (reverse) of the Appeal record).

The trial court gave another reason why the motorcycle could not have collided into the middle section of the lorry. The 1st appellant stated in her police report, that the middle section of the lorry collided with her motorcycle. The 2nd respondent stated in his police report that the motorcycle collided with the rear tyre of the lorry. In other words, both parties agreed, at least in their respective police reports that was much referred to by the trial court, that the collision was at the right side of the lorry. Admittedly, SP4 found no glass or other fragments on the road and no scratch marks on the road or on the lorry. But both parties agreed that the collision was at the right side of the lorry. So, any finding should be consistent with that agreed fact. The trial court preferred the version, "motorsikal plaintiff pertama yang di tunggangi dengan laju oleh plaintif pertama yang tidak mengawalnya ... akibat ia memakan jalan defendan kedua dan terlanggar lorinya" (see p. 23 of the Appeal Record). In the words of the 2nd respondent, "apabila saya sampai di selekoh tajam di Kampong Tanjong Olak, tiba-tiba datang sebuah motosikal dari hadapan saya dan masuk ke hak laluan saya dan terlanggar ke tayar lori saya disebelah kanan". But how could the motorcycle that was in front of the lorry, have collided with the rear tyre of the lorry? There was no evidence that the 2nd respondent, to avoid the collision, had swerved to the left, as could account then for the collision with the rear tyre. It was held that the 1st appellant had lost control of her motorcycle. But that was not the pleaded case of the respondents (see p. 9 of the Appeal Record), nor was it put to the 1st appellant or SP2 that the 1st appellant had lost control of the motorcycle. To be fair, the trial court should not have taken that non-issue. The trial court should not have rejected the 1st appellant's version and then accepted the 2nd respondent's version by a process of elimination when left with only the 2nd respondent's version, on a non-issue.

The trial court also rejected the 1st appellant's version for the reason, "rajah kasar (P4) tidak menyokong versi plaintiff pertama". With respect, the sketch plan did not not support the 1st appellant's version. The 2nd respondent testified, "selepas kemalangan itu saya berhenti sekejap dan pergi ke hadapan tidak jauh dari tempat kemalangan". Hence, the sketch plan would not convey a fair idea of the relative position of the lorry at

about the time of the collision. Both the 1st appellant and SP2 were taken to hospital. There was no evidence that the motorcycle was moved after the collision. Hence, the sketch plan conveyed a truer idea of the relative position of the motorcycle at about the time of the collision. And pentinently, the sketch plan showed the fallen motorcycle on its own half of the road, consistent with the 1st appellant's version that the lorry had encroached onto her path. Of course, the motorcycle could have fallen, fortuitously onto its own half of the road. Still, at the very least, six of one and half a dozen of the other, the sketch plan was neutral. To say therefore that the sketch plan did not support the 1st appellant is to rush to judgment.

Indeed, there was a rush to judgment. Without any cogent reason (that SP2 was a friend without more was not a cogent reason), SP2 was held as an interested witness. And without any proffered reason, it was held that the damage to the front wheel of the motorcycle – "Kerosakan motosikal iaitu rim di hadapannya bengkok adalah konsisten dengan versi defendan kedua" –was consistent only with the 2nd respondent's version, whereas that damage was also consistent with the 1st appellant's version.

Quite clearly, the 1st appellant's version was disbelieved and was rejected on account of improper inferences, all against the 1st appellant. It was held that the 2nd respondent who could "cut corners" could not. Whereas it was not imperatively so, it was held that the collision would leave the lorry with some marks. Admittedly, the lorry might have been an old tramp, carrying timber, and was approaching a sharp bend. But that lorry was powerful enough to carry heavy timber, and so reasonably it was powerful enough, with acceleration and road, to have gathered speed. That the lorry could have been speeding was not at all inconceivable. Yet, it was held that there was no possibility that the lorry could have been speeding (see p. 29 of the Appeal Record). It was held that the sketch plan did not support the 1st appellant, whereas it was not imperatively so, and that SP2 was an interested witness, whereas SP2 was definitely not. And it was held, that the 2nd respondent could not have been at fault, because, he remained at the scene. Alas, it was not appreciated that by that reasoning, that all those injured, who would have been taken to hospitals normally shortly after the accident and so would not be at the scene, would not have the benefit of such an inference, albeit that they were free of all fault.

The 1st appellant's version is not improbable. The lorry could have encroached onto the wrong side. Indeed, the 1st appellant's version was consistent or more consistent with the incontestable evidence – the motorcycle collided into the side, be it rear wheel or middle section, of the lorry. On the other hand, the 2nd respondent's version could not explain

just how then the motorcycle would have collided into the side, be it rear wheel or middle section, of the lorry, for going by the 2nd respondent's version, the motorcycle (said to have been in front of the lorry and then encroached onto the lorry' path) would then have collided with the front and not the side of the lorry. It has to be, that the 2nd respondent's version was inconsistent with the incontestable evidence – the motorcycle collided into the side, be it rear wheel or middle section, of the lorry.

On balance, the 1st appellant's version was more plausible. Just that the proper inferences were not drawn from the matters adverted to, the wrong assumptions were made, and the material probabilities were not considered. And just that the incontestable evidence by which the conflicting versions could be tested, was not the touchstone.

Inferences were the foundation of the result – negligence was not proved. Not founded on specific facts, the result, not surprisingly, was not supported by the incontestable evidence. Fortunately, an appellate court, in appropriate circumstances, can act upon its own view of the conflicting evidence (*Yusoff bin Kassim v. Public Prosecutor* [1992] 3 CLJ 1535). In the present case, the circumstances clearly warrant appellate interference.

But what about the undisputed fact that the 1st appellant was riding without a valid licence?

Mr Harjit Singh Nijar for the appellants submitted that the penalty for driving without a licence is only that under the Road Traffic Act 1987. It should not blackball the 1st appellant from maintaining an action. A distinction must be drawn between a claim based on an illegal act in the full sense of the word, and an act which if licensed is not an illegal act. The *maxim ex turpi causa non orbitur actio* only applies to contract cases. The trial count equated non-possession of a licence as negligence. The facts revealed that the accident was caused by the negligence of the 2nd respondent. "Would a negligent driver's fault (vanish) because the other party was not licensed?" Mr Harjit, who himself asked the question, answered "No". In *Chu Kim Sing & Anor v. Abdul Razak bin Amin* [1999] 4 CLJ 448, the rider succeeded in his claim, even though he was without a valid licence.

Miss Lai Kuan Jean for the respondents submitted that s. 26 of the RTA provides that no person without a valid driving licence shall drive a motor vehicle on the road. Section 39 of the RTA provides that no person under 16 years of age shall drive a motor vehicle on a road. "The (1st appellant) was only 12. She was not competent at all to drive. She had no business

to be on the road. She was a trespasser and a danger." Miss Lai asked, "Should the law sanction an unlicensed person to be on the road?", and, "Do road users owe a duty of care to unlawful road users?" In support of her argument, Miss Lai cited *Rubie v. Faulkner* [1940] 1 KB 571, where the supervisor, while in a motor vehicle driven by a learner driver but failed to prevent the accident, was convicted of aiding and abetting the learner driver in the commission of the traffic offence, and *Chua Kim Suan (Administratrix of the estate of Teoh Tek Lee, decd) v. Government of Malaysia* [1994] 1 CLJ 321, where the claim for loss of earnings from an illegal source was not allowed by the Federal Court.

Mr Harjit crisply replied that there is a duty of care to all on the road.

In the case of *Chu Kim Sing & Anor v. Abdul Razak bin Amin (supra)* cited by Mr Harjit, the appellant driving a car along a minor road did not stop at the halt line at the road junction and collided into the respondent riding a motorcycle along the major road. At the conclusion of the trial (by then, the appellant had pleaded guilty to a charge of careless and inconsiderate driving and had been sentenced), the trial court found the appellant 100% liable for the accident. On appeal, it was contended that the respondent was contributorily negligent, based on the fact, *inter alia*, that the respondent did not have a valid driving licence and that the respondent was not wearing a safety helmet.

Having collated and surveyed most carefully a host of authorities (see p. 457), Abdul Malik Ishak J said:

> In my judgment, the fact that the respondent did not have a valid driving licence, and was not wearing a safety helmet and the fact that the motorcycle ridden by him was without a road tax (or) insurance and was not fitted with a horn cannot in law make him negligent. There was no duty on the part of the respondent to minimise the effects or probable consequences of any injury that he may suffer, but which he has yet to suffer, through the negligence of another. It was not foreseeable for the respondent to foresee that harm would fall on others as to make him liable for actionable negligence for riding the motorcycle while those extraneous factors were contravened by him and neither would the respondent foresee that by riding the motorcycle with those extraneous factors being contravened by him would result in harm to himself and thereby contributing to the cause of the accident.

Indeed, the following authorities also say, to the effect, that breach of statutory rules *per se* is not conclusive proof of negligence.

In *Verney v. Wilkins* [1962] 106 Sol Jo 879, where the infant plaintiff was injured when riding as a passenger in a car driven by the defendant who only held a provisional licence, Winn J held that there was no actionable claim against the driver merely on the ground that injury had been caused by him and that at the time he was not a fully licensed driver, or was one who had not passed the driving test.

In *Phillips v. Britannia Hygienic Laundry Company, Limited* [1923] 2 KB 832, the plaintiff brought an action against the defendants in the following circumstances. While the defendants' servant was driving their motor lorry, one of the axles broke in two, a wheel came off, ran along the road and struck and damaged the plaintiff's van. About seven weeks before this the defendants had sent their lorry to the makers to be overhauled and repaired. The makers replaced one worn axle with a new one, and rethreaded and annealed the other; the makers did not consider it necessary to replace it with a new axle. The plaintiff's particulars of claim in the action were based on the alleged negligence of the defendants, but at the trial the plaintiff also relied upon other grounds, the main one being that the defendants had been guilty of a breach of art. II, cl. 6, of the Motor Cars (Use and Construction) Order 1904, made under the Locomotives on Highways Act 1896(2), and that the breach of the regulation caused the damage. The county court held that the defendants were not negligent but that the makers were negligent in not having replaced the defective axle with a new one. On appeal, the Divisional Court (McCardie and Bailhache JJ) reversed the judgment of the county court and entered judgment for the defendants. The plaintiffs appealed.

On that art. II., cl. 6 which reads "the motor car and all the fittings thereof shall be in such a condition as not to cause, or to be likely to cause, danger to any person on the motor car or on any highway", Bankes LJ said:

> The clause therefore was not passed for the benefit of a class or section of the public. It applies to the public generally, and it is one among many regulations for breach of which it cannot have been intended that a person aggrieved should have a civil remedy by way of action in addition to the more appropriate remedy provided, namely a fine.

Atkin LJ who was of the same opinion further opined:

> In my opinion, when an Act imposes a duty of commission or omission, the question whether a person aggrieved by a breach of the duty has a right of action depends on the intention of the Act ... One question to be considered is, Does the Act contain reference to a remedy for breach of it? *Prima facie* if it does that is the only remedy. But that is not conclusive ... I have come to the conclusion that the duty that they were intended to impose was not a duty enforceable by individuals injured, but a public duty

> only, the sole remedy for which is the remedy provided by way of a fine ... it is not likely that the Legislature intended by these means to impose on the owners of vehicles an absolute duty to have them roadworthy in all events even in the absence of negligence.

Younger LJ who was in total agreement was more direct:

> ... I am satisfied that a mere breach of art ... by the defendant does not give rise to any cause of action to the plaintiff.

Further, in *Croston v. Vaughan* [1938] 1 KB 540, 552, Greer LJ held that it does not follow that a failure to carry out any provisions of the Highway Code is necessarily negligent.

Could there be any doubt? There is one other authority. In *Che Wil v. Mahmood bin Ismail* [1982] CLJ 484, Mohamed Zahir J, who hit the nail on the head, succinctly said:

> I am of the opinion however that breach of the (Road Traffic) Rules is not itself evidence of negligence on the part of the person concerned. The question that has to be decided is who (was) negligent. The deceased might have contravened the said r. 35 but was he to be blamed for the accident?

It is very clear; riding or driving without a valid licence *per se* is not negligent. Perhaps some other violations of the Highway Code, such as failure to give way to through traffic, may enter, depending on the facts, into the cause of an accident. But riding or driving without a valid licence *per se* would not enter into the cause of an accident. Rather, it is the manner of the riding or driving and or conduct on or in relation to the road that enter into the cause of a motor accident or collision. In the present case, the fact that the 1st appellant was riding the motorcycle without a valid driving licence, without a safety helmet and even with a pillion rider, could not and did not enter into the cause of the collision. The fact of the matter was that on the balance of probabilities, the 1st appellant did not cause or contribute to the cause of the accident. Also, the 1st appellant did not contribute to her injuries. In not wearing a safety helmet, she was not being prudent, for a reasonably prudent man would foresee that the wearing of a safety helmet might result in less harm being caused to him, whether by someone else or by himself, if he is involved in an accident or collision while riding a motorcycle. But she did not sustain any head injuries, and the wearing of a safety helmet would not have reduced her injuries. In all respects, she could not be faulted, for the collision, or for the extent of her injuries. She should not have been penalised.

Now to answer Miss Lai, the law of course does not sanction a person without a valid licence to be riding or driving a vehicle on the road. But that person is not, as would seem to have been suggested by Miss Lai, fair game, with no rights. He is still entitled to the same duty of care expected of to be accorded to all on and adjacent to the road. For it is an underlying principle of the law of the highway that all must show mutual respect and forbearance (see *Searle v. Wallbank* [1947] AC 341, 361). The only remedy, or penalty if you like, is that prescribed in the RTA. The remedy is not an actionable wrong.

Accordingly, in allowing this appeal and finding the 2nd respondent 100% liable for the reasons above, it is hereby ordered, that the respondents do pay to the appellants the sums as provisionally assessed by the trial court and for which there is no appeal, and, that the respondents do pay the costs of this appeal and below.

Earlier, both learned counsel agreed that the respondents' counter-claim which was not decreed upon by the trial court should follow the result of this appeal. Accordingly, the respondents' counter-claim is dismissed with costs.